FINAL STATEMENT OF REASONS AND PUBLIC REPORT
DEPARTMENT OF PESTICIDE REGULATION

Title 3. California Code of Regulations
Amend Section 6388
Pertaining to Disclosure of Mill Assessment Reporting

UPDATE OF THE INITIAL STATEMENT OF REASONS

The originally proposed regulatory action was noticed in the California Regulatory Notice Register on April 9, 2004.

During the 45-day public comment period, the Department of Pesticide Regulation (DPR) received three letters of comment on the originally proposed text. The comments are discussed under the heading "SUMMARY AND RESPONSE TO COMMENTS RECEIVED" of this Final Statement of Reasons. These comments have been added to the rulemaking file.

During review of the written comments, DPR staff determined that a change should be included in a modified text. A summary of this change is found below under the heading "CHANGES TO THE TEXT OF PROPOSED REGULATIONS."

DPR prepared a Modified Text of Proposed Regulations and a Notice of Modifications to Text of Proposed Changes in the Regulations. DPR mailed copies of these documents to each person who had submitted comments on the originally proposed text. In addition, copies of these documents were posted on DPR's Internet Home Page.

During the 15-day period provided for public comment on the Modified Text of Proposed Regulations, one comment was received.

DPR amended section 6388(d) of Title 3, California Code of Regulations (CCR). The pesticide regulatory program activities affected by this action are those pertaining to the disclosure of the pesticide mill assessment reports of pesticide registrants required by this regulation. In summary, this action brings the regulation into compliance with current California law under the Public Records Act (PRA), Government Code (GC) section 6250 et seq.

The designation of the mill assessment reports of registrants in situations where there are three or fewer registrants reporting sales of products containing a single active ingredient as "trade secrets" is invalid and inconsistent with existing California law, specifically with the requirements of the PRA (GC section 6250 et seq.).

The mill assessment reports are not "trade secrets" as defined in the PRA or Uniform Trade Secrets Act, Civil Code section 3426 et seq. The information contained in the reports required under section 6388 consisting of the aggregated quarterly sales by dollar and volume of registered pesticide products in no way relates to the production process of a product or provision of a service, and has no independent economic value. While disclosure of these reports provides information on the relative market position of the top three sellers of pesticide

products containing a particular active ingredient, such information is not a trade secret. It has no "independent economic value," as that term is understood and defined by the courts when determining trade secret status. It is market information that may, along with information from other sources, be used by registrants in their decision-making process. The common reason cited to justify this nondisclosure in past rulemaking packages is that it was necessary to "prevent competitors from obtaining an unfair competitive advantage." This information gives no one an unfair competitive advantage. All competitors would have equal access to the information.

In fact, the nondisclosure language of subsection 6388(d) creates the anomalous situation of protecting the "trade secrets" (presumably in the reports) of some registrants (where there are three or fewer whose products contain the same active ingredient) but not the "trade secrets" of other registrants. Such an artificial designation contravenes the intent of the PRA.

Even if the information contained in the reports submitted by some registrants pursuant to section 6388 could be arbitrarily designated a "trade secret," the PRA requires their production as a public record unless DPR could make the determination that the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record. Therefore, the amendment brings the regulation into compliance with California law. Additionally, since the creation of the California Environmental Protection Agency, there has, at times, been confusion in the regulated community over whether reference to "EPA" in DPR's regulations refers to the U.S. Environmental Protection Agency or the California Environmental Protection Agency. In order to clarify which agency is being referenced, DPR replaced all references to the previous acronym for U.S. Environmental Protection Agency--"EPA," with the acronym "U.S. EPA."

CHANGES TO THE TEXT OF PROPOSED REGULATIONS

DPR made a change to the originally proposed text. Instead of deleting the section 6388(d) as originally proposed, DPR replaced the language with new language that would address both its concerns regarding the inappropriate justification for the nondisclosure of certain mill reports as trade secrets and the inconsistency of the current language with the provisions of the PRA, and the concerns expressed in the comments submitted by registrants. The new language explicitly protects the confidentiality of the price information of all registrants pursuant to a specific exemption in the PRA that incorporates certain privileges outlined in the Evidence Code.

SUMMARY AND RESPONSE TO COMMENTS RECEIVED

DPR received comments during the 45-day public comment period from the Western Plant Health Association (WHPA) (commentor #1); Wilbur-Ellis Company (commentor #2); and McKenna Long and Aldridge, Attorneys at Law (commentor #3).

Commentor #1

Comment:
The proposed regulatory action is unfounded, and is not supported by the record or any other evidence. We demonstrate that:

- the pricing and sales data that will be disclosed as a result of the action are trade secrets under the applicable State and federal law.
- the data are properly exempt from disclosure under the Public Records Act.

Response:
The primary contention underlying the WPHA comment is that the subject matter of the mill assessment reports are trade secrets that are protected from disclosure under state and federal law. First, California law regarding the protection of trade secrets is the law applicable in this case. Secondly, if the information here in question were indeed properly classified as a trade secret, protection from disclosure would be found in GC section 6254(f) of the PRA that incorporates by reference the privileges of the Evidence Code, in this instance, Evidence Code section 1060 related to trade secrets. It is the position of the Department that the information contained in mill assessment reports does not constitute a trade secret under California law, and that any protection afforded these reports must rely upon the exemption provided by GC section 6255 of the PRA that provides protection from disclosure if the public interest in nondisclosure outweighs the public interest in such disclosure.

It should be noted that the Department believes that the deletion of subsection 6388(d) will clarify the proper reason and standard for nondisclosure of these report in conformance with California law and will not have a substantial impact on the practice of the Department with respect to disclosure of these reports. Before such reports will be disclosed, the burden is on a member of the public (or a competitor) to show a higher benefit to the public from disclosure than the public interest in nondisclosure which is to encourage complete and accurate reporting and the submission of the mill assessments that fund the Department's pesticide regulatory program.

Turning to the definition of trade secret, the comment does include a brief reference to the case of *Uribe v. Howie (1971),* 19 Cal App.3d. 194. However, there is no discussion of the facts of the case and the court's reasoning which are dispositive on the trade secret issue presented here. The plaintiff in that case sought the disclosure of pesticide spray reports that contain detailed information about pesticide applications including the company making the application; the

owner of the property; the product used and the combination, quantities, and concentrations of the chemicals applied; and the date of application. Despite the detail in these reports, the Court ruled that the reports were not trade secrets. In making that ruling, the Court discussed the requisite analysis to be used in determining what constitutes a trade secret.

First, the court in *Uribe* adopts the *Restatement of Torts* definition of trade secret, noting that it has been adopted by the California courts and is similar to the definition found in GC section 6254.7 protecting air pollution data. That definition is as follows:

> A trade secret may consist of any formula, pattern, device or compilation of information which *is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it*. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving material, a pattern for a machine or other device, or a list of customers. … A trade secret is a process or device for continuous use in the operation of a business. Generally, it relates to the production of good, as for example, a machine or formula for production of an article. It may, however, *relate to the sale of goods* or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management (emphasis added).

In addition, the court cites the Restatement's requirement that there must be some element of secrecy to the subject matter of the purported "trade secret." The information here at issue does not meet this accepted definition. What the reports contain are aggregate sale figures and aggregate pounds of pesticides sold on a quarterly basis. What can be derived from these reports is not a transaction price, not a discount scheme, not the profit margin of the registrant, not a marketing strategy, not a scheme of price concessions or rebates, not the registrant's cost of production, nor the mark-up used, but merely an average price of all product sold regardless of quantity or customer. More specific price information, which could arguably present a much higher competitive concern to a registrant, is available and known to its customers in the marketplace who are under no obligation to keep such information secret.

The other California cases cited in the comment to support the finding that the type of information here constitutes a trade secret simply do not support that contention. Those cases either reach a decision on other grounds without ruling on the validity of the trade secret claim or involve information distinctly different from that at issue here.[1]

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[1] *State Farm Mutual Automobile Insurance Company v John Garamendi (2004)* 32 Cal.4th 1029, detailed statistical information about insured's business found not exempt from disclosure as a trade secret under the Public Records Act as disclosure mandated by Insurance Code section 1861.07; *Whyte v.Schlage* (2002) 101 Cal.App.4th 1443, decision turned on whether the actual or threatened misappropriation occurred, but found that pricing information *not readily known in the industry* like *cost of materials, labor, overhead, and profit margin, pricing concessions, promotional discounts, advertising allowances, and volume rebates* could constitute a trade secret; *Roberts v. Gulf Oil(1983)* 147 Cal.App.3d 770, data in question, feasibility studies and engineering reports, even if trade secrets,

Comment:
The proposed regulatory action is unfounded, and is not supported by the record or any other evidence. We demonstrate that:

- the disclosure of sales and pricing data under circumstance such as these creates a potential for adverse effects on businesses and the California economy because it can provide an unfair competitive advantage to competitors of the companies submitting this information and this information can be used for anticompetitive purposes; and

- there is a valid justification for protecting information from disclosure submitted by three or fewer registrants in contrast to information submitted by four or more registrants.

Response:
The perception by registrants that disclosure of the reports could provide an unfair competitive advantage to competitors and that there is more of a justification for protecting the information when there are three or fewer registrants are considerations which would weigh in favor of nondisclosure and would erode the weight of any benefit to the public from such disclosure in specific cases. This would support nondisclosure under the balancing test of GC section 6255 of the PRA.

Commentor #2

Comment:
The main point of the comment is that the information on the mill report represents confidential business information that registrants have a business interest in protecting from disclosure to competitors or potential competitors. Further, the registrant points out that it has acquiesced and complied with the mill assessment reporting and collection over the years based upon the assumption that the report will be given confidentiality.

Response:
The Department agrees with the points made by the registrant. However, the deletion of subsection 6388(d) is meant to make the regulations consistent with current California law, not authorize disclosure of the reports. The proper standard governing disclosure of these reports is not the arbitrary designation of some as trade a secret, but the balancing test of section GC section 6255 of the PRA. As noted above, it is in the public interest to maintain the confidentiality of these reports to encourage and assure complete and accurate reporting and the submission of the mill assessment.

Commentor #3:

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could be disclosed to the county assessor; *Abba Rubber Co.v. Seaquist* (1991) 235 Cal.App.3d 1, a customer list was found to be a trade secret.

Comment:
Copies of the Department's rulemaking files regarding previous amendments of section 6388 and its predecessor, section 2433.1 should be incorporated, into the administrative records because they contain relevant information to the proposal.

Response:
Previous rulemaking files regarding the specific regulation that is the subject of a current proposal typically are not made part of the administrative record. Although such files may be reviewed during the process of developing and submitting a proposal, they are not relied upon as the basis of the proposal. However, DPR notes that such files will become part of the record in this instance, as they are attached to the comment submitted.

Comments Received During the 15-Day Public Comment Period for the Modified Text of Proposed Regulations

DPR received one comment from McKenna Long and Aldridge, Attorneys at Law.

Comment:
The proposed paragraph (d) states that, "The individual report specified in (b) and the dollar sales figures associated with a specific product found on the report shall be considered official information …" The proposed language insertion makes no mention of 6388(c). For all intents and purposes, other than a different title for the report, the report specified in 6388(b), which would be protected as confidential is nearly identical to the report specified in 6388(c). My contention is that the report cited in 6388(c) should be afforded the same protection as 6388(b) and that the proposed paragraph 6388(d) should be revised to read: The individual report specified in (b) and (c) and the dollar sales figures associated with a specific product found on the report shall be considered official information . . .

Response:
The form described in section 6388(c) is actually designated on its face PR-ENF-180/181, and is treated as the cover sheet of form PR-ENF-180 described in section 6388(b). The Department treats these forms essentially as one document and it would be considered protected from disclosure under 6388(d).

PUBLIC HEARING

DPR received no requests to hold a public hearing and no hearing was scheduled or held.

MANDATE ON LOCAL AGENCIES OR SCHOOL DISTRICTS

DPR has determined that the proposed regulatory action does not impose a mandate on local agencies or school districts requiring reimbursement by the State pursuant to Part 7 (commencing with section 17500) of Division 4, of the GC because the regulatory action does not constitute a "new program or higher level of service of an existing program" within the meaning of section 6 of Article XIII B of the California Constitution. DPR has also determined that no nondiscretionary costs or savings to local agencies or school districts will result from the proposed regulatory action.

ALTERNATIVES DETERMINATION

The Director has determined that no alternative considered by DPR would be more effective in carrying out the purpose for which this regulation is proposed, or would be as effective and less burdensome to affected private persons or businesses than the proposed regulatory change.

POSTING REQUIREMENT

3 CCR, section 6110, states in part that, "The public report shall be posted on the official bulletin boards of the Department, and of each commissioner's office, and in each District office of the DPR [Division of Pest Management, Environmental Protection and Worker Safety] for 45 days." DPR has posted its Initial Statement of Reasons and Public Report on its official bulletin board, which consists of the Department's Internet Home Page <http://www.cdpr.ca.gov>. In addition, copies were provided to the offices listed above for posting.